80-537

Supreme Court, U. S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

IN RE: J.W.B., J.G.B., AND K.L.B.

ON APPEAL FROM THE
SUPREME COURT OF TEXAS

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellee, the Taylor County Child Welfare Unit, moves the Court to dismiss the appeal filed herein, or in the alternative, to affirm the judgment of the Supreme Court of Texas, on the following grounds:

1. The questions on which decision of this cause depends are so insubstantial as to need no further argument.

2. Appellant's second question on appeal is not within the jurisdiction of the Court under

the provisions of 28 U.S.C. §1257(2).

3. Appellant failed to raise certain portions of his second ground for appeal in the State courts.

4. Appellant has no standing to challenge the competence of the children's attorney ad litem.

Appellant has requested that her Jurisdictional Statement be considered a petition for writ of certiorari on those grounds which are not appealable under 28 U.S.C. §1257(2). If Appellant's Jurisdictional Statement is so considered, Appellee requests the Court to consider this Motion a brief in opposition to Appellant's petition.

STATUTE INVOLVED

This appeal questions the validity of portions of Section 15.02 of the Texas Family Code. The statute governs termination of the parent-child relationship in the State of Texas.

Section 15.02(1) sets forth eleven specific grounds which may be the basis of a suit

to terminate the parent-child relationship. The trial court must find that at least one of these grounds exists in order to grant a petition requesting termination.

In the case at bar, termination was based on subsections (B), (D) and (E) of Section 15.02(1), which read as follows:

> 15.02(1) the parent has
> (B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months;
> (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;
> (E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child.

In addition to finding the existence of one or more of the grounds set forth in Section

15.02(1), the Texas statute requires the trial court to make an affirmative finding under Section 15.02(2), which reads as follows:

> 15.02(2) termination is in the best interest of the child.

NATURE OF THE CASE

In February of 1978, the Taylor County Child Welfare Unit, Appellee herein, filed a Petition to Terminate the Parent-Child Relationship between Appellant and her minor children. Following a jury trial in October and November, 1978, the trial court entered a decree terminating Appellant's parental rights and appointing the Taylor County Child Welfare Unit managing conservator of the children.

The judgment of the trial court was affirmed by the Court of Civil Appeals, 11th Supreme Judicial District, at Eastland, Texas, on the 18th of October, 1979. The Supreme Court of Texas refused Appellant's Application for Writ of Error on May 14, 1980. Appellant's Motion for Rehearing

was overruled on July 23, 1980.

Appellant then appealed to the Supreme Court of the United States pursuant to Title 28 U.S.C., Section 1257(2), maintaining that portions of Section 15.02 of the Texas Family Code are unconstitutionally vague and overbroad, and that Appellant was denied due process and subjected to double jeopardy at her trial.

ARGUMENT

1. THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

The first question on appeal, i.e. the constitutionality of Section 15.02(1)(D) and (E) and 15.02(2) of the Texas Family Code, is so wanting in substance as to require no further argument to the Court. See Wilheim v. Moffat Tunnel Improvement District, 262 U.S. 710, 716-17(1923): Ex parte Poresky, 290 U.S. 30,32(1933); and Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co., 252 U.S.

388,397(1920).

A.
Section 15.02(2)

The major focus of Appellant's attack is the best interest standard set forth in Section 15.02(2). While Appellee agrees that standing alone and with no further interpretation this standard would be impermissibly vague and overbroad as the controlling standard in a suit to terminate parental rights, the best interest standard as used by the Texas courts functions is a protection for the parent against whom termination is sought.

Affirmative findings under both subsections of Section 15.02 are necessary to justify termination. Holley v. Adams, 544 S.W.2d 367, 370 (Tex. 1976); and Wiley v. Spratlin, 543 S.W. 2d 349, 351 (Tex. 1976). Section 15.02(1) sets forth specific behaviors which are sufficient grounds to justify termination. Section 15.02(2), containing the best interest standard, is an

additional protection designed to preserve the family unit in cases in which special circumstances mitigate or excuse the behaviors set forth in Section 15.02(1). It is not intended to proscribe specific conduct.

Further, a statute may be rescued from a finding of vagueness by state court decisions which set forth factors and criteria to be taken into account by the courts in making decisions under the statute. See Colten v. Kentucky, 407 U.S. 104 (1972). The best interest of the child standard has been elaborated upon by the Texas Supreme Court in the Holley case, supra, which lists nine factors the trial court should consider in determining the best interest of the child. The factors are:

(A) the desires of the child;
(B) the emotional and physical needs of the child now and in the future;
(C) the emotional and physical danger to the child now and in the future;
(D) the parental abilities of the individuals seeking custody;
(E) the programs available to assist these individuals to promote the

best interest of the child;
(F) the plans for the child by the individuals or by the agency seeking custody;
(G) the stability of the home or proposed placement;
(H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and
(I) any excuse for the acts or omissions of the parent.

Holley v. Adams, supra at 372.

B.
Section 15.02(1)

Appellant also attacks Section 15.02(1)(B), (D), and (E) as being impermissibly vague and overbroad. A non-criminal statute is unconstitutionally vague under the due process clause of the Fifth or Fourteenth Amendments only when its language does not convey sufficiently definite warning as to the conduct proscribed, when measured by common understanding or practice. Arnett v. Kennedy, 416 U.S. 134, 158-64 (1974); and United States v. Cardiff, 344 U.S. 174, 176 (1952). Before it will be struck down, a statute must be so vague that men of common intelligence must

guess at its application. Giaccio v. Pennsylvania, 382 U.S. 399 (1966); and Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

A finding of vagueness will result only where "the exaction of obedience to a rule or standard...is so vague and indefinite as really to be no rule or standard at all..." A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233, 239 (1925). See also Broadick v. Oklahoma, 413 U.S. 601, 607-08 (1973); and Arnett v. Kennedy, supra at 159-60.

The sections of the termination statute at issue in this case provide fair warning of the type of conduct which will justify termination of parental rights. Section 15.02(1)(D) covers situations where the parent neglects a child by exposing him to conditions or surroundings which endanger the child either physically or emotionally, while Section 15.02(E) contemplates aggressive behavior toward the child which results in physical or emotional abuse.

Higgins v. Dallas County Child Welfare Unit, 544 S.W.2d 745, 749 (Tex. Civ. App.--Dallas 1976), no writ. It is true that the trier of fact must determine on a case by case basis whether the specific conduct or conditions involved endanger a child, but it would be impossible for the statute to set forth each act or surrounding which constitutes a danger to children. As previously stated by this Court, the vagueness doctrine "is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing...statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." Colten v. Kentucky, 407 U.S. 104, 110 (1972).

2. APPELLANT'S SECOND QUESTION ON APPEAL IS NOT WITHIN THE JURISDICTION OF THE COURT.

Appellant's second ground for appeal is an assertion that she was deprived of due process

and subjected to double jeopardy in a quasi-criminal proceeding. Appellant has set forth 28 U.S.C. 1257(2) as the statute providing the Court with jurisdiction of this appeal. This statute gives the Court the right to review final judgments of the highest court of a State where a State statute is upheld against a challenge that such statute is repugnant to the Constitution, treaties or laws of the United States.

Appellant's second ground for appeal does not challenge a state statute, and thus is not within the Court's appellate jurisdiction.

3. APPELLANT FAILED TO RAISE CERTAIN PORTIONS OF HIS SECOND GROUND FOR APPEAL IN THE STATE COURTS.

Appellant's assertions that she was subjected to double jeopardy in a quasi-criminal proceeding and that the state had no compelling interest in terminating parental

rights in this case were made for the first time in the Jurisdictional Statement filed with this Court. This Court has consistently ruled that before its jurisdiction may be invoked on appeal from a state court, the Federal questions involved must be properly raised in the courts below. Hulbert v. Chicago, 202 U.S. 275 (1906); Brown v. Commonwealth of Massachusetts, 144 U.S. 573 (1892); and John v. Paullin, 231 U.S. 583 (1914).

In the State courts, Appellant did not challenge the finality of the decree entered in the first termination proceeding brought against her, nor did she challenge the procedures by which her children were removed from her. In the Texas appellate courts, Appellant relied on the doctrine of res judicata, claiming that some of the evidence introduced at her trial had been introduced in a previous termination case.

Texas courts have long recognized an

exception to the rule of res judicata in cases dealing with the parent-child relationship. This exception allows the admission of testimony concerning prior acts of misconduct where such acts are offered to corroborate similar acts in a proceeding subsequent to the original decree. Wilson v. Elliott, 96 Tex. 472,73 S.W. 946 (1903); Olds v. Burton, 181 S.W.2d 118 (Tex. Civ. App.--Eastland 1944, no writ); Pennington v. Pennington, 195 S.W.2d 677 (Tex. Civ. App.--Texarkana 1946, no writ); Otto v. Otto, 438 S.W. 2d 587 (Tex. Civ. App.--San Antonio 1969, no writ); and Ex Parte Gallop, 486 S.W.2d 836 (Tex. Civ. App.--Beaumont 1972, writ ref'd. n.r.e.).

The testimony objected to in the case at bar concerned Appellant's instability, her propensity to abandon her children when faced with stress, and her neglect of her children. This evidence was offered to corroborate Petitioner's conduct after regaining custody of her children at her first termination hearing, and to

establish a continuing pattern of behavior. Therefore, the evidence was not barred by the principle of res judicata.

As for Appellant's assertion that the State had no compelling interest to justify petitioning to terminate Appellant's parental rights, it cannot be argued that the State has both the right and the duty to protect children from neglect or abuse. See Prince v. Massachusetts, 321 U.S. 158 (1944); and Stanley v. Illinois, 405 U.S. 645 (1972). In this case, a child psychologist's expert testimony established that Appellant's children suffered emotional harm in the form of anxiety, a sense of threat and helplessness, and an inability to express or accept affection as a result of the instability the children experienced in their relationship with their mother. (S.F. 577-78, 580-81, 584, 585, 606, 793). Testimony established that Appellant had at least fifteen residences in less than

a three-year period (S.F. 293-4, 297-8, 303, 305, 311, 316, 421, 447, 454, 660); was separated from the man who was then her husband five times in a one-year period (S.F. 316); and had approximately ten jobs in a two and one-half year period (S.F.660). While the children were in her custody, Appellant left them with relatives whom they hardly knew (S.F. 437); left them with babysitters and failed to return for them (S.F. 235,291); and left them with the man who was then her husband for extended periods while she went to parties and bars and he had no knowledge of her whereabouts (S.F. 454, 456).

This pattern of behavior had continued over several years, and there was no evidence that it would change. The expert testimony directly linked Appellant's instability and the children's emotional problems.

4. APPELLANT LACKS STANDING TO CHALLENGE THE COMPETENCE OF THE CHILDREN'S ATTORNEY

AD LITEM.

A party may not appeal an issue which is not adverse to him, even though he was a party to the action in which that issue was decided. Milgram v. Loews, Inc., 192 F.2d 579 (1952), cert. den. 343 U.S. 929. Only the aggrieved party may appeal. United States v. Adamant Co., 197 F.2d 1 (1952), cert. den.; Bullen v. Scoville, 344 U.S. 903; and Queensboro Farms Products v. Wickard, 137 F.2d 969 (1943).

If the interests of the children have not been properly represented, they have the right to bring suit against their attorney through a proper representative, such as next friend. Texas Employers Ins. Ass'n. v. Grimes, 153 Tex. 357, 269 S.W.2d 332 (1954); and In re Dudley's Estate, 88 S.W.2d 616 (Tex. Civ. App.--San Antonio 1953, writ dism'd.). It is not proper for the parent, whose interests may be in opposition to the children, to appeal their representation.

Furthermore, although Appellant challenges the competence of the children's attorney, she points to no specific incidence of incompetence or neglect of his duty, nor does Appellant clearly set forth in what manner the attorney ad litem failed in his responsibility, other than the ad litem's failure to side with Appellant.

5. THERE IS NO MERIT TO APPELLANT'S CONTENTION THAT APPELLEE COMMITTED CUMULATIVE PROCEDURAL ERROR WHICH PREJUDICED THE JURY AGAINST APPELLANT.

Appellant maintains that Appellee's attorney made repeated efforts to admit inadmissible and inflammatory evidence, which forced Appellant's attorney to make repeated objections, thereby prejudicing the jury against him.

Appellant presents no evidence or support from the record that Appellee intentionally attempted to prejudice the jury by

interjecting improper testimony, nor does he show that the jury was, in fact, prejudiced by counsel's behavior.

Generally, the asking of improper questions is reversible error only if the conduct of counsel was improper, and was reasonably calculated to cause and probably did cause the rendition of an improper verdict. Tex. R. Civ. P. 434 and 503; Aultman v. Dallas R & T Co., 152 Tex. 509, 260 S.W.2d 596 (1953); and Condra Funeral Home v. Rollin, 158 Tex. 478, 314 S.W.2d 277 (1958). Cases requiring reversal are those in which evidence sought to be elicited would have been extremely prejudicial, and the questions asked by their very nature tend to inflame the jury, even if left unanswered. Scott v. McLennan, 306 S.W.2d 942 (Tex. Civ. App.--Waco 1957, writ ref'd. n.r.e.).

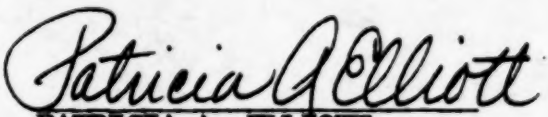
Appellee would point out that Appellant made sixty-four objections to the testimony of sixteen witnesses. On the average, fewer

than three objections per witness were upheld. Further, Appellee averaged approximately the same number of objections to each of Appellant's witnesses.

CONCLUSION

For the foregoing reasons, Appellee respectfully moves the Court to dismiss this appeal, or in the alternative to affirm the judgment of the Texas Supreme Court.

Respectfully submitted,



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